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NTSB Order No. EA-4087

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. BENIGNO FERNANDEZ TAMARGO, Respondent.	Docket SE-11322

OPINION AND ORDER

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on May 2, 1991, following an evidentiary hearing.[1] The law judge affirmed in part and dismissed in part an order of the Administrator suspending respondent's airline

[1]The initial decision, an excerpt from the hearing transcript, is attached. Respondent did not reply to the Administrator's appeal brief.

transport pilot certificate for 60 days. The Administrator's order charged that respondent had violated 14 C.F.R. 91.9, 91.65(a), and 91.67(a) and (e).[2] The law judge affirmed the § 91.65(a) charge, dismissing the remaining allegations, and reduced the sanction to a 15-day suspension. We modify the initial decision and grant the Administrator's appeal to the extent we find that respondent also violated § 91.67(e). We affirm the 15-day suspension imposed by the law judge.

The Administrator's order arose in connection with a November 21, 1988 incident during which, it was charged, respondent, flying a twin engine Beechcraft 95, overtook and flew too close to a single engine Piper Cherokee. The Administrator

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[2] § 91.9 (now, as pertinent, 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Respondent was charged with reckless conduct.

§ 91.65(a) (now 91.111(a)) provided:

> No person may operate an aircraft so close to another aircraft so as to create a collision hazard.

§ 91.67(a) and (e) (now 91.113(b) and (f)) provided:

> (a) General. When weather conditions permit, regardless of whether an operation is conducted under Instrument Flight Rules or Visual Flight Rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this section. When a rule of this section gives another aircraft the right of way, he shall give way to that aircraft and may not pass over, under, or ahead of it, unless well clear.
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> (e) Overtaking. Each aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear.

introduced testimony by an FAA general aviation operations inspector, William McNease, who was the pilot of the Cherokee, that respondent flew directly at him, despite his radio calls, and when respondent's aircraft was so close (approximately 50 feet, and converging, Tr. at 48) that he felt a collision was imminent, Mr. McNease pulled up and to the left.[3] Respondent's aircraft, according to Mr. McNease, never changed course.

Respondent admitted that he was the pilot in command of the aircraft, but argued that he never was so close to the Cherokee as to create a collision hazard. He testified that he had the Cherokee in his sight during the entire episode, that he attempted to advise it by radio that he was overtaking, and that he kept well clear to the right while he was overtaking. After overtaking, he continued, the Cherokee turned steeply to the left.[4] Respondent offered various mathematical calculations designed to show that Mr. McNease's version of events could not be accurate.[5]

The law judge dismissed all but the § 91.65(a) (collision hazard) charge. Respondent appeals the failure to dismiss that charge, and the Administrator appeals the law judge's dismissal

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[3]Mr. McNease investigated this incident for the FAA.

[4]On cross-examination, Mr. McNease acknowledged that this testimony was the same as the explanation respondent offered during his earlier investigation.

[5]The law judge seems to have placed no weight on these calculations, nor do we. They proceed from an unsupported premise, contrary to the evidence of record, that Mr. McNease did not first see the Beechcraft until it was only 100 feet away. See Tr. at 17-21, 37, 46-48, 55-56.

of the other charges.

Respondent argues that the law judge's analysis of the applicable law was flawed in that he stated that the standard of proof was an objective one, and then applied a subjective test.[6] Respondent further faults this analysis because, earlier, the law judge had opined that it was impossible to judge distances in the air (Tr. at 179). In view of this statement, respondent questions how the law judge could credit Mr. McNease's testimony that he was in danger of a collision hazard.

We agree with the law judge's conclusion, but our reasons differ. Evidence of a collision hazard will often be based only on testimony of the involved pilots. In this case, an experienced pilot felt compelled to take evasive action in the face of respondent's operation. Testimony of the Cherokee's other occupant, Vaughn Olson, who was taking a check ride, also indicated respondent's proximity. This witness believed that respondent must not have seen them, and thought there would have been a midair collision had Mr. McNease not taken evasive action. This is acceptable evidence of a collision hazard, and the fact of the evasive maneuver by an experienced pilot is especially compelling, objective evidence. When countered only with respondent's denial and unpersuasive mathematical hypothesis, we can see no error in the initial decision's ultimate conclusion

[6]Specifically, the law judge stated that an objective standard is applied to decide whether someone operated so close to another as to create a collision hazard. The law judge proceeded to state that this would depend on whether the pilots thought there was a collision hazard. Tr. at 181.

that a violation of § 91.65(a) had been established, despite the law judge's failure to adhere to the distinction between the objective and subjective that he believed essential.

The Administrator has appealed the law judge's dismissal of the § 91.67(a) and (e) (failure to be vigilant, see and avoid, and overtake properly) and § 91.9 (recklessness) charges. Upon review of the record, we agree with the law judge's dismissal of the § 91.67(a) and 91.9 charges because we find that the Administrator did not meet his burden of proof on these matters. We reinstate the § 91.67(e) charge.

The Administrator's § 91.9 argument on appeal is premised on the proposition that operating an aircraft in a way that creates a collision hazard equates to recklessness. However, the Administrator has the burden of proving respondent's recklessness. A finding of recklessness carries with it a considerably greater burden of proof than does a finding of carelessness. Recklessness can be equated to gross negligence. Administrator v. Understein, 3 NTSB 3564, 3567 (1981) ("grossly negligent or reckless"). See also Administrator v. Kelly & Kelly, 2 NTSB 1408, 1410 (1975) ("their conduct of the flight was so devoid of basic safe operating practices and adherence to critical safety regulations that it constituted reckless operation."). In view of the law judge's finding that respondent had the second plane in sight and moved in the correct direction to overtake it (which finding the Administrator does not directly challenge), a finding of recklessness is not supported by a

preponderance of the evidence.[7]

For similar reasons, we uphold the law judge's determination that a violation of § 91.67(a) has not been established, except insofar as respondent did not "pass well" of the second aircraft, a matter we consider, on these facts, to be captured entirely by the charge of a violation of § 91.67(e), which we will reinstate. To prove a violation of the see and avoid provisions of § 91.67(a), the Administrator must show, by a preponderance of the evidence, that respondent failed to maintain vigilance so as to see and avoid other aircraft. The law judge found, as fact:

> [Respondent] did see the other aircraft. You did take action. You went to the right of the aircraft as required by the FAR [Federal Aviation Regulations]. . . . you did take action to alter your course to the right of the aircraft you were overtaking.

Tr. at 181.

These facts do not appear to be in real doubt and, although respondent's flight path might have brought him perilously close to the second aircraft (close enough to be deemed a collision hazard), he must be presumed to have had the intention and skill to avoid the other aircraft, given the level of proficiency shown on this record. This does not, however, require the assumption that he would have passed "well clear," and that is the essence of the §91.67(e) charge. We think the evidence supporting the

[7]The Administrator's cites to Administrator v. Werner, 3 NTSB 2082 (1979) and Administrator v. Hayes, 3 NTSB 1528 (1978) are unavailing, as both affirmed only carelessness, not recklessness, findings. The Administrator did not alternatively allege carelessness.

law judge's finding that respondent created a collision hazard is just as compelling on this issue, and that a violation of § 91.67(e) must be sustained. Arising as it does from the same set of facts as the § 91.65(a) charge, we do not believe that it requires additional sanction. Hence we will leave the law judge's recommended 15-day suspension undisturbed.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is denied, except as to the violation of § 91.67(e) for which the appeal is granted; and

3. The 15-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.[8]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[8]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).